IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1114 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE

HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MUSTAKALI ABBASALISAIYED AGED ABOUT 42 YEARS, OCC.ADVC - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
NANAVATY ADVOCATES for Appellant(s) : 1,
MR LR PUJARI learned Addl. Public Prosecutor for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 11/08/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. The present appeal under sec. 34 of the Prevention of Terrorism Act, 2002 (hereinafter referred to as "POTA" for short) read with section 439 of CrPC, 1973, is directed against the order passed by the learned Special Judge in regular bail application being Criminal Misc. Application No. 1677/2006. The appellant came to be arrested on 23.11.2004 in connection with CR No. I-6/2003 which was registered with the DCB Police Station, Ahmedabad for the offences punishable under sec. 120B, 121, 121(6), 122 and 123 of IPC, sec. 25(1)(b)(c), 27 and 29 of the Arms Act as well as under sec. 3(1)(a), 3(1)(b), 3(3), 4, 20, 21(2)(b), 22(3)(a)(b) of POTA.

2. It is pertinent to note that on earlier occasion the appellant has preferred Criminal Misc. Application No. 3519/2004 which was rejected on 21.12.2004. Aggrieved by the said order, an appeal before this court was preferred and direction was given to the trial court by an order dated 21.2.2005 to examine the contentions raised

in the application on merits. After filing of the charge-sheet, the appellant preferred the regular bail application being Criminal Misc. Application No. 1298/2005 which was rejected by order dated 30.5.2005. The appellant preferred the appeal being Criminal Appeal No. 1367/2005 and the said appeal was withdrawn as the period of one year from the date of the arrest of the appellant had elapsed by the time the matter came up for hearing before the High Court. The High Court gave the direction to approach the trial court by filing a fresh application as the rigour of sub-sec. 6 of sec. 49 of POTA would not operate against the appellant. The regular bail application was, therefore, heard by the learned Special Judge and after hearing the arguments at length, the same was rejected by an order dated 3.6.2006.

3. The appellant being aggrieved by the aforesaid order, preferred the present appeal, contending inter alia, that the learned Special Judge has erred in not appreciating the material which was placed on record of the case. Even though, there was no iota of evidence available against the appellant indicating his connection

with the offence, the application preferred by the appellant was rejected by the learned Special Judge. It is submitted that the learned Special Judge has failed to appreciate the term conspiracy in its proper perspective in deciding the bail application of the appellant. The interpretation made by the learned Special Judge of the term conspiracy was thoroughly misconceived and erroneous. As there was lack of connection of the appellant with the original accused or the conspirator, the appellant ought to have been enlarged on bail. The appellant was mainly involved in the offences alleged against him on various grounds. One of the ground is with regard to the managing the immovable property known as “Green Bungalow”, which was alleged to have been purchased by Sharifkhan a proclaimed absconder. It is further submitted that the entry of Rs. 1 lac was made in the accounts of Shah Brothers, who, prior to some point of time, were original owners on the record of the “Green Bungalow”. It is further submitted that the “Green Bungalow” was in the name of original owners till the time the Senior Advocate of the appellant entered into an agreement to sell. When the alleged agreement to sell

was prepared, no other additional income or consideration was paid to Shah Brothers by other party as against the transaction with regard to the “Green Bungalow”. The learned Advocate submitted that appellant has been falsely involved in the said transaction.

4. The learned Special Judge has miserably failed to appreciate the fact the provisions of POTA were repealed on 21.9.2004 and, thus, the allegations under the above mentioned CR against the appellant cannot be carried further under the provisions of POTA. The learned Judge has also not appreciated the fact that there was substantial change in the circumstances after the period of one has elapsed as provided under sec. 49(7) of the POTA. The confessional statement recorded against the appellant has not been appreciated by the learned Judge in proper perspective. As soon as the remand of the appellant was over, he was produced before the learned Metropolitan Magistrate, Ahmedabad and, subsequently, appellant retracted the confessional statement. When the appellant was produced before the learned Special Court

(POTA), he submitted hand-written retraction of the confession, but the same was not considered by the learned Special Judge while rejecting his bail application. The learned Advocate representing the appellant submitted that he was arrested on 22.9.2002 and since then he is in custody. The fact that the appellant is a practicing lawyer and is nowhere involved in any offence except in the present case, and further that he was falsely and maliciously implicated in the case, has been overlooked by the learned Special Judge. The learned Advocate submitted that while considering the confessional statement under sec. 32 the pre-requisite of sub-sec. (2) of Sec. 32 cannot be overlooked and as the provisions contained in sec. 32, sec. 4 and 3 are not complied with as they are mandatory in nature, the appellant ought to have been granted bail by the learned Special Judge. The learned Advocate submitted that with regard to the recovery of fire arms from the flat of the appellant, no question was put to the appellant in the confessional statement, as the fire arms were subsequently recovered from his flat and as the subsequent recovery was of a doubtful nature, the

appellant ought to have been granted bail. The learned Advocate further submitted that even the provisions of POTA has been falsely invoked so far as the appellant is concerned. Even provisions of sec. 3 and 4 cannot be attracted so as to implicate the appellant in the commission of the offence under POTA. The learned Advocate further submitted that the material which was available against the Investigating Agency was of sketchy nature on the basis of which the appellant cannot be roped in under the provisions of POTA. The FSL report was not on record of the case, but was obtained subsequently and the same was not considered by the learned Special Judge in deciding the connectivity of the appellant with the commission of the offence. Even the recovery of the fire arms, as per the submission of the learned Advocate for the appellant was made when the provisions of POTA were not in existence. When a prima-facie case is made out against the appellant under sec. 3 then a presumption can be raised under sec. 53 of the POTA and as no case was made out by the Investigating Agency under the provisions of sec. 3 of the POTA no presumption can be raised under sec. 53 of the POTA. In

view of the aforesaid fact and circumstances, the learned Advocate submitted that since the prima-facie involvement of the appellant in the commission of the offence is not established by the prosecution, the appellant is required to be enlarged on bail. The learned Advocate also submitted that taken into account the fact that two of the colleagues of the appellant were released on bail by the learned Special Judge, the same analogy would apply to the case of the appellant and even on the ground of parity, the appellant is required to be enlarged on bail as prayed for in the appeal.

5. Learned Advocate has placed reliance on the following judgments in support of the submissions canvassed at the Bar.

1. **2006(4) SCC p.680.**

   (Kirtibhai Madhavlal Joshi vs State of Gujarat)

2. **(2005)11 SCC 600**

   (State (NCT) of Delhi v. Navjot Sandhu alias Afsan Guru)

6. Learned Addl. Public Prosecutor Mr. LR Pujari placed reliance on the confessional statement given by the appellant under sec. 32 of the POTA and submitted that along with the appellant, the confessional statement of Javedkhan, Rayed, Hasulkhan Raikhand, Abdul Sattar Mahmad Saiyed, Niranjan Navinchandra Patel etc. were recorded and those statements prima-facie indicate the involvement of the appellant in the commission of the offence under POTA. learned Addl. Public Prosecutor submitted that all the requirements under sec. 32 of POTA were complied with by the authority at the time of recording the confessional statement. The admissibility or otherwise of those statements can be considered at the time of trial and not at the time of considering the bail application of the appellant. The retraction in the confessional statement given by the appellant can be considered at the time of trial. learned Addl. Public Prosecutor submitted that two fire arms were recovered from the possession of the appellant. Taking into account the confessional statement recorded under sec. 32 of the

POTA the recovery of the fire arms from the appellant and other material on record of the case, the prima-facie involvement of the appellant is established by the Investigating Agency. Thus, the learned Addl. Public Prosecutor submitted that there was sufficient material available against the appellant so as to reject his bail application by the learned Special Judge. As no new ground is made out in the appeal so as to call for any interference in the order passed by the learned Special Judge (POTA), the appeal is liable to be dismissed.

7. Learned Addl. Public Prosecutor has placed reliance on the following judgments, which are as under:

1.(2004)7 SCC 528

(Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav & Anr.)

2.AIR 2001 SC 2778

(State of Tamil Nadu Vs. Kutty alias Lakshmi Narasimhan)

3.1995(2) SCC p. 25

(Mahabir Bisvas & Anr. vs. State of W.B.)

4. 2003 SCC (Crime) 1853

(Jameel Ahmed & Anr. Vs. State of Rajsthan)

5. 2004(9) SCC 580

(People's Union for Civil Liberties & Anr. vs. Union of India)

8. Thus, the learned Addl. Public Prosecutor submitted that taking into account the gravity of the offence, the nature of the involvement of the appellant in the commission of the crime along with the confessional statement of the appellant and the co-accused, the recovery of fire arms and other material which was available on record of the case, the appellant has not made out a case for the grant of the bail, and, therefore, the appeal preferred by him deserves to be dismissed.

9. This Court has heard Mr. ND Nanavti learned Sr. Advocate for the appellant and Mr. LR Pujari learned Addl. Public Prosecutor for the respondent-State at length and in great detail. This court has undertaken a complete and comprehensive appreciation of all vital features of the case and the material on which reliance is placed by

both the sides. This court has carefully considered various authorities cited by the learned Advocates of both the sides and we find that there is no dispute about the ratio or proposition laid down in those cases.

10. The appellant has preferred the present appeal for his enlargement on bail under sec. 34 of the POTA. The appellant came to be arrested in connection with CR No. I-6/2003 which was registered with the DCB Police Station, Ahmedabad on 22.9.2002 for the offences punishable under sec. 120B, 121, 121(6), 122 and 123 of IPC, sec. 25(1)(b)(c), 27 and 29 of the Arms Act as well as under sec. 3(1)(a), 3(1)(b), 3(3), 4, 20, 21(2)(b), 22(3)(a)(b) of POTA. The confessional statement of the appellant was recorded under sec. 32 of the POTA, subsequently, the appellant retracted the confessional statement. We have perused both, the confessional statement as well as the retracted confession made by the appellant. The statement of co-accused recorded under sec. 32 of the POTA is also perused by us. The fire arms were recovered form the possession of the appellant and the panchanama with regard to recovery of fire arms was prepared. The

appellant was involved in a criminal conspiracy along with co-accused. Thus, taking into account the gravity of the offence, the nature of the involvement of the appellant in the commission of the offence, the confessional statement of the appellant recorded under sec. 32 of the POTA as well as those of the co-accused and the recovery of fire arms from the flat which was in occupation of the appellant, prima-facie indicate the involvement of the appellant in a serious offence. It is true that rigour of sec. 49(6) of the POTA would not operate against the appellant after the lapse of one year and the application preferred by the appellant can be considered as an application under sec. 439 of CrPC, but the Court cannot be oblivious of the seriousness of the crime under IPC and Arms Act as well as under the provisions of POTA. It has been strenuously contended by the learned Advocate on behalf of the appellant that provisions of sec. 32 are not complied with by Investigating Agency, but prima-facie the confessional statement under sec. 32 along with the other material, recovery of fire arms etc. suggest the prima-facie involvement of the appellant in the commission of crime and, therefore, we are of the firm

view that the appellant has not made out a case for his enlargement on bail as prayed for in the appeal. Thus, taking into account the aforesaid facts and circumstances of the case, as the appellant has not made out a case for grant of bail, this appeal is liable to fail. Hence, we pass the following order:

10. This appeal fails and is hereby dismissed.

(A.R. DAVE, J.)

(H.B. ANTANI, J.)

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